IN THE

Supreme Court of the United States

TERM—1941

GEORGE T. MORTIMER,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The Opinion of the Circuit Court of Appeals for the Second Circuit is reported in 118 F. 2d. 266. It is annexed to the certified transcript of the Record filed herein (3494-3503).*

No opinion was rendered by the United States District Court for the Southern District of New York.

II.

Jurisdiction.

The Judgment sought to be reviewed was entered on April 2, 1941. The jurisdiction of this Court is based upon Judicial Code, Section 240 (a), as amended, U. S. C. Title 28, Sec. 347.

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* Numbers in parentheses refer to folios in printed transcript of Record, except as otherwise indicated.

III.

Statement of the Case.

A summary statement of the case is set forth in the petition, and is, therefore, not repeated here. A summary of the argument is set forth in the Index.

IV.

Specification of Assigned Errors To Be Urged.

It is intended to urge all the Errors assigned (R. 3398-3486), including the following:

1. It was error to compel petitioner, over objections and exceptions, to testify, on cross examination, that he did not accept an invitation from Government Counsel to appear and testify before the Federal Grand Jury investigating this case; and the learned Circuit Court of Appeals erred in sustaining the Trial Court's rulings which compelled the petitioner to so testify.

2. It was error to admit in evidence, over petitioner's objections and exceptions, the incompetent hearsay testimony of Government witness Karcher concerning alleged tax arrears and in admitting in evidence the incompetent hearsay charts, summaries and graphs prepared by Karcher and allegedly showing such arrears; and the learned Circuit Court of Appeals erred in holding that the Trial Court properly received in evidence the said testimony of Government witness Karcher and the said Karcher charts, summaries and graphs.

3. The learned Circuit Court of Appeals erred in its construction and application of the recent Federal Statute Title 28 U. S. C. A. Sections 695 and 695H, by which erroneous construction and application the Circuit Court of Appeals attempted to justify the admission in evidence of the incompetent hearsay Karcher testimony, charts, summaries, and graphs relating to said alleged tax arrears.

4. In view of the fact that the Conspiracy Count (Fourteenth Count of the Indictment) fails to charge a crime, in that the facts alleged are wholly insufficient as a matter of law, the Trial Court erred in denying petitioner's motion to dismiss the Indictment at the close of the Government's case; and the learned Circuit Court of Appeals erred in affirming petitioner's conviction based on an Indictment insufficient in law.

5. The learned Circuit Court of Appeals erred in its construction and application of the Federal Conspiracy Statute, Title 18 U. S. C. A. Sec. 88 (Criminal Code Sec. 37),—to the particular facts of this case as they related to petitioner.

Argument.

POINT I.

It was reversible error to compel petitioner on cross examination, over objections and exceptions, to testify that he did not accept an invitation from Government Counsel to appear and testify before the Federal Grand Jury investigating this case. The learned Circuit Court of Appeals erred in affirming petitioner's conviction, brought about, in part, by this improper prejudicial cross examination.

The very first question addressed to petitioner on cross examination by counsel for the Government involved an invitation to him from Government Counsel to appear before the Federal Grand Jury investigating this case and tell his side of the case. The question was objected to; the objection was overruled and exception taken (4946-48). Petitioner was then asked what happened when he appeared before the Grand Jury. This question was likewise objected to and exception taken; but the question was not answered, and the Prosecutor proceeded with another question (4949-51).

Petitioner was then asked if he accepted the invitation to appear before the Grand Jury and testify, and, over objection and exception, was compelled to testify that he did not accept the invitation. There is nothing anywhere in the record to indicate what happened when petitioner appeared before the Grand Jury, and no attempt was made to prove that he refused to testify or invoked his constitutional rights at that time.

The evidence thus elicited from petitioner enabled the Trial Jury to infer that he had refused to testify before the Grand Jury because of consciousness of guilt or

some fear that his testimony before that body might tend to incriminate him, or because of some other undisclosed factor equally damaging to his defense. Coming as it did at the very beginning of his cross examination, it is obvious that this testimony immediately prejudiced petitioner in the minds of the Jury,—as it was intended so to do. It is impossible to say that this highly prejudicial testimony did not substantially affect the result of the trial as far as petitioner is concerned. The evidence should not have been admitted.

If followed to its logical conclusion, the sanction and approval of this method of cross examination by a Prosecutor would prevent any indicted defendant from testifying in his own defense at the trial of an indictment unless he had testified, in advance, before the Federal Grand Jury investigating his case. Such procedure, or rule, would compel every prospective defendant under criminal investigation before a Federal Grand Jury to surrender the constitutional immunity and protection guaranteed him under the provisions of the United States Constitution that

> "no person shall be compelled in any criminal case to be a witness against himself * * *" (Amendment No. 5),

and to voluntarily appear and testify before that body (thereby giving the prosecution the benefit of such Grand Jury testimony, which of course could be used against the prospective defendant on the trial), on penalty that if the prospective defendant did not accept the invitation of Government's Counsel and appear before the Grand Jury and testify his failure or refusal to do so would be used against him upon the trial. In either event the damage to every prospective defendant would be irreparable, and as a practical matter would seriously deprive defendants of any real opportunity to defend themselves.

Although the question involves so serious a matter as the invasion of and the encroachment upon the constitutional rights and immunities of a citizen which guarantee him protection against self incrimination, the precise point has never been passed upon by this Court.

Raffel v. *United States* (271 U. S. 494); *United States* v. *Buckner* (108 F. 2d. 921; certiorari denied 309 U. S. 669); *Tomlinson* v. *United States* (93 F. 2d. 652, certiorari denied 303 U. S. 646), and *Commonwealth* v. *Smith* (163 Mass. 411), cited by the learned Circuit Court as justifying this improper prejudicial cross examination of petitioner, are readily distinguishable.

Raffel v. *United States, supra*: In that case there were two trials. On the first trial the defendant did not testify; the jury disagreed. On the second trial he was asked by the Court to explain why he had not testified in his own behalf at the first trial. This Court held it was not error to require the defendant when he took the stand in his own behalf *at a second trial* to disclose that he had not testified at the first trial. The situation presented in that case was essentially different from the situation presented in the instant case in that, in the *Raffel* case, the defendant was actually on trial before a Petit Jury in both instances, was represented by counsel, and was protected by all the privileges of cross examination, confrontation, hearing all of the evidence and presenting such witnesses as he might desire; whereas in the instant case the Grand Jury proceedings were secret, and none of the protections above set forth would have been available to petitioner if he had accepted the invitation to testify.

United States v. *Buckner, supra*: In that case the defendant refused to testify before the Securities and Exchange Commission regarding a tipster profit-sharing scheme he had arranged with a speculator named Breen. At the trial of his indictment *the defendant Buckner opened the door*

to the Government Attorney, on his direct examination, regarding that very scheme. On cross examination Buckner declared there was nothing wrong with this scheme, and the Prosecutor was then permitted to bring out that Buckner had claimed his privilege before the Securities and Exchange Commission and was then asked and compelled to testify why he claimed the privilege if there was nothing wrong with the scheme. Clearly in that case, as the decision of the Circuit Court of Appeals (Second Circuit) stated, "The Breen deal was certainly in issue"; and under those circumstances the Court found that there was no reason why his refusal to testify before the Securities and Exchange Commission should not be used against him.

Tomlinson v. *United States, supra*: That case involved a situation where the defendant Tomlinson had voluntarily testified *on direct examination* as to why he had not appeared before the Federal Grand Jury.

But at the trial of the indictment in the instant case petitioner *was not* interrogated about and did not testify upon his direct examination regarding the Grand Jury incident. Neither petitioner nor his counsel had referred in any way upon direct examination to the Grand Jury investigation or the invitation from Government's counsel to petitioner to appear before the Grand Jury and testify. In the face of these facts the situation definitely was one where petitioner had neither done nor said anything on his direct examination by which the door to the improper prejudicial cross examination was opened. In fact there was no proof that petitioner had claimed any privilege before the Federal Grand Jury.

The obviously improper and prejudicial purpose behind the Prosecutor's cross examination of petitioner was that the Trial Jury should draw *an inference* from an assumed circumstance,—of which there was absolutely no proof,—i.e. that from the fact petitioner appeared but did not testify before the Federal Grand Jury the Trial Jury would *draw*

the inference that he had asserted, before the Grand Jury, his constitutional privilege against self-incrimination, and then from that inference draw *another inference* that petitioner had asserted his constitutional privilege before the Grand Jury because of some consciousness of guilt or some fear that his testimony before that body would incriminate him.

Independent of the constitutional question involved this was prejudicial error of a most serious character. It is well settled that a presumption cannot be based upon a presumption; or an inference drawn from an inference. (*Brady* v. *United States*, 24 F. 2d. 399, 403 (C. C. A. 8); *Vernon* v. *United States*, 146 Fed. 121, 126 (C. C. A. 8); *Freeman* v. *United States*, 20 F. 2d. 748 (C. C. A. 3).)

It was reversible error for the Trial Court to deprive petitioner of the constitutional safeguards with which he should have been surrounded in order to prevent the Trial Jury from reaching the conclusion, which undoubtedly it did reach, that there was something incriminating in his failure to tell his story to the Federal Grand Jury investigating this case. That this was not a mere technical error is illustrated by the very recent Opinion of this Court in *Bruno* v. *United States*, 308 U. S. 287. The harm done to petitioner's defense was not remedied by anything which transpired thereafter; and it is our submission that once this testimony, on petitioner's compulsory cross examination, was admitted, nothing could thereafter be done to enable him to overcome its prejudicial effect. On the contrary, this prejudicial effect was heightened when the Prosecutor, at the close of his summation, stated:

> "* * * that grand jury heard some of these defendants, and you have heard from the witness stand that some of them did not appear of their own volition,—of their own volition they did not appear. The Grand Jury

acted in its capacity, and it did what I presume it felt was its duty and filed this indictment here" (6974).

The irreparable harm done petitioner in the minds of the Trial Jury was thus intentionally and strikingly enlarged by the above last minute statement of the Prosecutor.

The situation in the instant case comes within the principles stated and applied by this Court in

Counselman v. *Hitchcock,* 142 U. S. 547,

where this Court said, at page 582:

> "* * * illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The limitations on the extent to which an indicted defendant may be cross examined at a trial of the indictment and the extent to which testimony so elicited may be used against him are illustrated by *People* v. *Brown* (72 N. Y. 571, 573), *People* v. *Michor* (226 App. Div. 569), *People* v. *Russo* (251 App. Div. 176), *Matter of Doyle* (257 N. Y. 244), in an opinion by the late Chief Justice Cardozo, and in *People ex rel. Lewisohn* v. *O'Brien* (176 N. Y. 253).

In sustaining the Trial Court's rulings which forced petitioner, on cross examination and over objections and exceptions, to admit that he did not accept the invitation of Government Counsel to appear and testify before the Federal Grand Jury investigating this case, the Circuit Court of Appeals has decided an important question of Federal Constitutional law which has not been, but should be, settled by this Court. The public interest will be promoted by the prompt settlement in this Court of said question.

POINT II.

The learned Circuit Court of Appeals erred in holding that the Trial Court properly received in evidence the incompetent hearsay Karcher testimony, charts, summaries and graphs.

A.

The Incompetent Hearsay Nature of Government Witness Karcher's Testimony, Charts, Summaries and Graphs.

One of the material issues at the trial involved alleged misrepresentations and concealment by the defendants of alleged tax arrears against properties securing the mortgages and certificates sold. Charts, summaries and graphs prepared by Government witness Karcher, indicating that a large percentage of the face amount of all mortgages in the Group Series,—which were the securities back of most of the participating guaranteed certificates—were received in evidence, as was also his testimony based thereon. The information contained in these charts, graphs and summaries constituted the basis and source of Karcher's testimony with respect to the alleged tax arrears, and these charts, graphs and summaries were, in turn, based on the incomplete in-

vestigations conducted by four (4) other Government employees,—only one of whom was called by the prosecution. Petitioner contends that (1) the Government's failure to call the witnesses essential to establish the alleged authenticity and correctness of these charts, graphs and summaries stamped them as incompetent hearsay, and they should have been excluded; and (2) that it also stamped all of Karcher's testimony relating to said alleged tax arrears as incompetent hearsay, and his testimony should have been excluded under the familiar rule that said witness's testimony was mere hearsay, and (3) that said charts, graphs and summaries should first have been verified and their correctness attested by other than hearsay evidence before they were received in evidence.

Karcher admitted that his testimony, charts, graphs and summaries concerning the alleged tax arrears on properties securing guaranteed mortgages and mortgage certificates were not based on his own personal investigation, but on what his assistants *reported to him* (1688, 1689, 1690, 1695, 1751, 1763, 1769, 1803, 1805, 1915, 1932, 1934, 1943, 2053, 2114, 2117, 2132, 2219, 2293).

The Company's own arrears cards could not be used as the source of information to determine the existence of alleged tax arrears, if any, because of the fact that the dates of payments of taxes were not entered on those arrears cards. If and when an owner exhibited his receipted tax bill, then only the date when the receipted tax bill was exhibited to the Company, would be stamped on the arrears card (2233; 3417-22). For this reason it became necessary for the Government's investigators, on the disputed question of alleged tax arrears, to examine the tax records at the New York City Tax Collector's offices in the Boroughs of Manhattan, Bronx, Kings and Queens.

But competent proof of the alleged tax arrears was lacking because the Prosecutor failed (a) to call as witnesses

all the men employed by the Government who it was claimed checked the alleged arrears in the various offices of the City Collector, and (b) to offer any competent proof of the alleged unpaid taxes claimed to have been disclosed on the tax records of the City Collector, and (c) to offer any competent proof of the alleged unpaid taxes claimed to have been disclosed on the tax records of the City Collector's offices,—said tax records not being in evidence in this case.

Government witness Browner, one of the men who claimed to have done some of the checking of the alleged tax arrears, was the only one of Karcher's assistants called to testify (2417-51). Mr. Tollette, Government investigator, was not called as a witness, although the Prosecutor knew where he was,—Fort Worth, Texas (1688); nor was J. E. Daly called, although he was actually in the court room during the trial (1688), nor E. M. Ward, each of whom Karcher testified did some of the work in connection with the Government's alleged investigation of the tax records (1688-89) called as witnesses. At the time of their alleged investigation of alleged tax arrears, Browner, Tollette, Ward, and Daly were special Government Agents *attached to the F. B. I.* (1608-9). Browner testified that he worked with Tollette, and that as Browner called off the information as to alleged arrears from the tax records, Tollette wrote something on the cards (2436-40). According to Browner, there was a separate card for each mortgage checked as to alleged arrears. "These cards were taken with us to the County Tax Offices and on which were made a record of the tax payments of the property, and which was marked on the cards" (2421). These work cards of said F. B. I. agents, which allegedly contained the information concerning the alleged tax arrears affecting each mortgage under investigation (2423), were not even offered in evidence by the Prosecutor. The same procedure was claimed to have

been followed in Group Series C-2, F-1, and the others. No effort was made to verify unpaid taxes by communicating with owners of the mortgaged properties to ascertain if the taxes had actually been paid though not yet entered or posted in the records of the Tax office, or to learn whether court proceedings had been commenced by the owners for reduction, remission, or cancellation of taxes (2445), pending which court proceedings the owners would, quite properly, not pay the taxes until the amount in dispute had finally been determined by the Court in such proceedings.

We again call attention to the fact that the tax records of the City of New York were not put in evidence and were not before the Court and Jury. As they were records from which the information was claimed to have been gathered to ascertain the alleged tax arrears on the various mortgaged properties, it was incumbent on the prosecution to *either* introduce these tax records into evidence, *or* furnish other non-hearsay proof of alleged non-payment of taxes claimed to be in arrears. There was a simple method of proof of alleged tax arrears, namely, a Certificate from the City treasurer of the City of New York (*N. Y. Civil Practice Act, Sec. 382*), or a search by a title or insurance abstract company (*N. Y. Civil Practice Act, Sec. 385*). The prosecution produced neither.

Consequently, even if it is assumed, *arguendo,* that the tax arrears reports of Browner and Tollette were competently proven, they would still be inadmissible as they were based on tax records not in evidence.

The incompetent hearsay Karcher charts, summaries and graphs, and the hearsay Karcher testimony based thereon, with their astronomical percentages and figures of alleged tax arrears were unquestionably most impressive in the minds of the Jury, as they permitted the Jury to reach the conclusion that the Company's guaranteed mortgages and certificates were being sold to the investing public at a time

when a large percentage of the mortgages were in arrears as to taxes. Thus the receipt in evidence of the incompetent hearsay Karcher testimony and documents, permitted the Jury to draw inferences adverse to petitioner, which would not have been drawn had said testimony and Exhibits been excluded altogether,—as they should have been. It requires absolutely no speculation to reach the conclusion that petitioner was prejudiced, beyond measure, by the extremely damaging Karcher testimony and documents relating to the alleged tax arrears.

B.

Error Committed by the Circuit Court of Appeals in Connection With the Incompetent Hearsay Karcher Testimony, Charts, Summaries and Graphs.

The learned Circuit Court in an endeavor to justify the above stated prejudicial error states in its Opinion of affirmance that

"the reliability of the charts is not questioned."

Such a conclusion by the learned Circuit Court, in face of petitioner's repeated objections to the reception in evidence of Karcher's testimony and Exhibits, is difficult to understand. The incompetency of Karcher's testimony, charts and summaries was questioned not once but again and again, because they had no foundation other than hearsay. The fact that petitioner was deprived of the opportunity of confrontation of the several investigators, the special Government agents attached to the F. B. I., and of subjecting each one of them and their alleged labors and investigations to cross examination prevented and hindered petitioner from any actual demonstration of the utter unreliability of the conclusions put before the Jury with respect to the alleged tax arrears.

Again, in endeavoring to sustain the grossly prejudicial error committed against petitioner, the learned Circuit Court stated

> "and, several of the defendants and their witnesses checked the figures and found no disparity, rather indeed that Karcher had been very fair."

But the work and figures of the F. B. I. agents, *who were not called* by the Government, were not checked by any defendant or any witness for any one of the defendants. What the petitioner did, after Karcher's grossly prejudicial hearsay testimony and Exhibits had been received in evidence, was to call Louis Kramer, a certified public accountant, who had prepared certain summaries (Defs' Ex. W(4)) which disagreed radically with the results and conclusions testified to by Karcher and shown on Karcher's charts, summaries and graphs. But Kramer did not check the hearsay figures of Karcher, nor did Kramer check the work sheets or cards either of Government's witness Browner, or of the Government's uncalled investigators, Tollette, Ward, and Daly.

The foregoing facts are in striking conflict with the above-quoted conclusion of the learned Circuit Court to the effect that defendants and their witnesses had checked Karcher's figures as to the alleged tax arrears and found that he had been very fair. Defendants' witness Kramer—the only one called by defendants in connection with the alleged tax arrears—testified that he did not know anything about Karcher's figures; that he *had not checked them*, and that he did not agree or disagree with them (6436-7 and 6480). All that defendant Breitwieser testified to, in that respect, was that he had attempted to reconstruct the alleged tax arrears situation, in regard to mortgages in but one series, C-2, from Company records which were admittedly so incomplete on this point and that he was unable to reach a

reliable result (3418-3425). Defendant Williams' testimony that one of his employees had found Karcher's figures fair, *related solely to sales* and reinvestments in Series C-2 (5882-3).

The learned Circuit Court in referring to the above-mentioned Defendants' Exhibit W(4) (pp. 3372-80) said:

> "An exhibit by an expert for the defense—made up in the way appellant here critizes—tallies remarkably with Karcher's charts, particularly when allowance is made for the fact that it does not include the second half for the 1932 taxes."

But the fact that petitioner, in an endeavor to overcome the incompetent hearsay Karcher testimony, charts, summaries and graphs, was forced to offer such evidence as he could with regard to the alleged tax arrears did not eliminate the highly prejudicial effect which said testimony and documents had on the minds of the Jury and did not cure the error which had been committed. Petitioner was certainly entitled, in the face of this incompetent hearsay evidence, to attempt to protect himself the best he could.

Furthermore, the finding of the learned Circuit Court that Kramer's Exhibit (Defs' Ex. W(4)) was

> "made up in the same way appellant here criticizes",

is erroneous. The Karcher charts, summaries and testimony were, as pointed out above, based upon alleged investigations by several persons other than the witness Karcher. Only one of these several persons testified, and none of their records, memoranda, or cards, if any existed, were put in evidence or even offered in evidence. On the other hand, Kramer's Summaries (Defs' Ex. W(4)), were, as definitely testified to by Kramer (6402-8), based upon certain Company records *actually in evidence* (Defs' Exs. S(4), T(4),

U(4), R. 2136), being reports made by Lybrand, Ross Bros. and Montgomery (fols. 6402-6). In other words, Kramer's Summaries, petitioner's rebuttal evidence, instead of being based on hearsay were founded *on the records* of the New York Title and Mortgage Company *which were in evidence.*

The conclusion of the learned Circuit Court that, assuming Karcher's hearsay and incompetent testimony, charts, summaries and graphs were erroneously admitted, there should, nevertheless, be no reversal because of

> "lack of a showing of substantial injury",

is, we believe, a shocking conclusion and one which is supported neither by reason nor by *United States* v. *Kelly* (2 Cir. 105 F. 2d. 912, 917) referred to by the learned Circuit Court. The reasoning assigned by our Circuit Court on this point, namely, that

> "the facts could have been brought out in any event by lengthy trial processes",

assumes the very controversial issue of fact in question; and, of course, such a premise if carried to its logical conclusion would dispense with proof altogether,—the sophistry being that because an alleged fact charged in an indictment is capable of proof, therefore it need not be proved.

United States v. *Kelly* (2 Cir., 105 Fed. 2d. 912, 917), cited by our learned Circuit Court, contains nothing which justifies the prejudicial admission of Karcher's hearsay testimony, charts and summaries, or the affirmance of petitioner's conviction. In the *Kelly* case, the Court after holding that inventory of the taxpayer's assets prepared by a Treasury Department accountant, a Government witness, was incompetent and should have been excluded, said:

> "However, it is inconceivable that this error should have controlled the verdict; the inventory referred to a time

> *three years after* the last (tax) return in controversy, and the use made of it does not appear. At worst it would have done no more than show discrepancy between the inventory of 1935 and the earlier years, and there is so much evidence of specific fabrication as would make a reversal for this reason a travesty of justice." (Italics ours.)

The above reasoning by the Court in the *Kelly* case does not apply to the instant case where (1) the prejudicial hearsay Karcher testimony, charts and summaries related to *the very period* covered by the alleged conspiracy and the alleged tax arrears,—1931 and 1932,—and not to a period subsequent to the times charged in the Indictment; and (2) the distorted presentation, by means of the hearsay Karcher testimony, charts and summaries, undoubtedly left an indelible imprint in the minds of the Jury and improperly controlled its verdict in this case.

The other reason assigned by the learned Circuit Court that

> "appellant had the benefit of all the aid in rebuttal which his expert (Kramer) could suggest,"

is equally fallacious. This reasoning, if sound, would permit the prosecution, in any case, to disregard all rules of evidence established to safeguard the rights of an accused, and would permit the reception in evidence of all manner of alleged proof and testimony, in violation of established rules of evidence, on the theory that although the incompetent and hearsay evidence is inadmissible and should be excluded, it may nevertheless be received because the accused can call rebuttal witnesses to refute the same. To advocate and apply to criminal cases such a rule of proof would reduce the trial of an accused from the serious business it is to nothing but a mock proceeding.

The learned Circuit Court suggests that it

> "would have been most expensive, as well as disruptive of the activities of the record offices and burdensome upon the Court",

had the prosecution, pursuant to *Section 382 of the New York Civil Practice Act,* procured Certificates from the City Treasurer with respect to the alleged tax arrears, or had produced a search by a title or abstract company, pursuant to *Section 385 of the New York Civil Practice Act.* But none of these suggested possible inconveniences has, in so far as counsel have been able to determine, ever been held to justify the incompetent hearsay evidence complained of. The prejudicial hearsay evidence cannot be justified (as suggested by our learned Circuit Court) on the ground that it would have been expensive for the Government to produce that type of proof,—if it existed,—which would have eliminated the prejudicial incompetent hearsay feature. Undoubtedly, it *was just as expensive* for the Government to employ the several special agents of the F. B. I., for a period of weeks, to make the alleged examinations and searches of the tax records in the various Boroughs of New York City as it would have been to produce either Certificates from the City Treasurer or Searches by a title or insurance company. But, having decided to use its own several special investigators to examine the tax records with reference to alleged arrears, it was then incumbent upon the prosecution to go all the way and *produce said investigators as witnesses* and proper testimony by them *before* Karcher's testimony, charts and summaries would be competent.

The petitioner's claim is not that secondary evidence, if such existed, of the alleged tax arrears would have been improper; but that until the proper foundation for the same were laid, in accordance with well recognized rules of evidence, such secondary evidence could not be properly

introduced. When it was received it constituted the rankest incompetent hearsay extremely prejudicial to petitioner.

C.

The Cases Cited by the Learned Circuit Court do not Justify the Admission of Karcher's Incompetent Hearsay Testimony, Charts, Summaries and Graphs.

The instant case is not one where the official tax records were either out of the jurisdiction of the Court, or lost. The Federal Court House in the Southern District of New York, where this case was tried, was not over one block from the City Collector's Office for the Borough of Manhattan, New York City, nor over half hour by subway from the City Collector's Office in the other three boroughs where the alleged investigation of the alleged tax arrears is claimed to have been made by Government's F. B. I. special agents. The instant case does not, therefore, come within the rules of *Burton* v. *Driggs* (87 U. S. 125, 136), or *Stephens* v. *United States* (41 F. (2d) 440), or *Galbreath* v. *United States* (257 F. 648, 658), cited by the learned Circuit Court. In fact, in *Burton* v. *Driggs,* where the books and records in question were beyond the jurisdiction of the Court, the results of the examination of the books were proved by the testimony of the *very persons who made the examination.* But in the instant case, Government's witness Karcher did *not make* the examination of the tax records.

The learned Circuit Court cites Sections 1218 and 1230 of *Wigmore on Evidence* (3d Ed.) in support of the asserted admissibility of Karcher's hearsay testimony, charts and summaries. Nothing in *Wigmore* justifies the admission of the Karcher testimony and documents. Section 1218 of Wigmore simply refers to the familiar rule that documents belonging "to any public office need not be produced, but may be otherwise proved." The petitioner has no quarrel

with this proposition. His contention is that Karcher's testimony, charts and summaries concerning the alleged tax arrears did not satisfy the established rules of evidence in such a case, and that the entire body of said so-called proof is nothing more than prejudicial incompetent hearsay. Indeed, Section 1230 of Wigmore (referred to by our Circuit Court) supports petitioner's contention. Referring to voluminous documents *Wigmore* says, at Section 1230:

> "The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness *who has perused the entire mass* and will state summarily the net result." (Italics ours.)

This Karcher did not, *and could not, do.* Only the several Government investigators,—if any one did,—perused the entire mass of entries, tax data, and official records in the various tax offices of New York City. They are the very persons *whom Wigmore says* should have been called. *But they were not called by the prosecution.*

Re The Spica (289 F., 436) does not sustain the admissibility of the incompetent hearsay Karcher testimony, charts and summaries on the ground that Karcher was the supervising agent. The rule laid down in the *Spica* case is that, in proving the activities of a large business the rule that a witness should speak only of matters of personal knowledge, on which he can be cross examined, will be relaxed when necessity exists, such as *where the witness cannot be found or cannot be produced in court.* In the instant case, the activities of a large business were not being investigated; instead, the several Government investigators who were not called had been specially engaged by the prosecution to *help in the preparation of the instant case for trial.* Furthermore, their addresses were known; and they could have been produced by the Government; only one was called; another was at the trial, but was not called by the Government.

Neither *Massachusetts Bonding Insurance Co.* v. *Norwich Pharmacal Co.* (18 F. 2d. 934), nor *United States* v. *Cotter* (60 F. 2d. 689, 693) justifies the admission of the incompetent hearsay Karcher testimony, charts and summaries. The rule applied by our Circuit Court in both of these cases, related solely to the method of proving entries made *in the regular course of business.* In the *Cotter* case, the question was whether ledger sheets of a bank in which certain accounts were kept, were, in themselves, competent. But these cases, as well as *United States* v. *Becker* (62 F. 2d. 1007), and *E. I. DuPont de Nemours & Co.* v. *Tomlinson* (296 F. 634, 640), relate solely to the question of *the foundation* which must be laid before proof of the contents of the records, *kept in the regular course of a large business enterprise,* may be received in evidence.

D.

The Circuit Court of Appeals in Holding that the Incompetent Hearsay Testimony Charts, Summaries and Graphs of Government Witness Karcher Relating to Alleged Tax Arrears were Properly Received in Evidence, has so far Sanctioned a Departure, by the Lower Court, from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's power of supervision.

The Great Northern Railway v. *Washington,* 300 U. S. 154;
Shepard v. *United States,* 290 U. S. 96;
Burton v. *Driggs,* 87 U. S. 125;
Queen v. *Hepburn,* 11 U. S. 290.

POINT III.

The learned Circuit Court of Appeals' construction and application of recent Federal Statute Title 28 U. S. C. A. Sections 695 and 695-h was erroneous.

A.

The Recent Federal Statute, Title 28 U. S. C. A. Section 695.

In sustaining the admission of Karcher's incompetent hearsay testimony, charts, summaries and graphs, relating to the alleged tax arrears, our learned Circuit Court of Appeals relied on the recent statute Title 28, U. S. C. A. Section 695 which is set forth in the Petition herein at page 3.

In its Opinion of affirmance our learned Circuit Court said:

> "Obviously this rule loses none of its force by reason of the passage of the recent statute 28 U. S. C. A. section 695, under which writings and records made in the regular course of any business, where it is the regular course of such business to make them, are admissible in any court of the United States. See Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 115 F. 2d, 492, 117 F. 2d, 222."

B.

The Fallacious Argument of the Circuit Court.

The learned Circuit Court reasoned that the Karcher testimony, charts, summaries and graphs objected to, were properly admitted under the provisions of the above quoted Statute. The reasoning being (1) that Karcher, in pre-

paring his charts, summaries and graphs as part of his work as a Government witness in the preparation of the instant case for trial, was engaged in a "business or profession" within the meaning of the Statute; and also (2) that Karcher's charts, summaries and graphs were "a memorandum or record of any act, transaction, occurrence or event" within the meaning of the Statute.

The statement of the foregoing proposition resulting from the learned Circuit Court's interpretation and application of the Statute to the instant case, is sufficient to demonstrate its fallacy. An examination of the application of the Statute as set forth by our Circuit Court of Appeals in *Ulm* v. *Moore-McCormack Lines* (115 F. (2d) 492), cited in the Opinion of affirmance, contains nothing which justifies the proposition and interpretation which the Circuit Court gave the Statute in the instant case. Instead, the whole tenor of the interpretation of the Statute by the Court, as expounded in *Ulm* v. *Moore-McCormack Lines,* is contrary to the application and interpretation of the Statute as made in the instant case.

The uncontrollable dangers which would inevitably follow from such a loose and radical interpretation as that given to the Statute by the learned Circuit Court in the present case, in order to sustain the admission of the prejudicial hearsay Karcher testimony, charts, summaries and graphs, relating to alleged tax arrears, is apparent without extended argument. Such a construction makes competent, as evidence, all types of charts, graphs, tabulations, memoranda, notes and writings which might be made by any Government *attorney, investigator, detective, accountant,* or *special agent,* assigned as part of the Prosecutor's staff, to help prepare any indictment for trial against an accused. In other words the Prosecutor's own staff may, under this construction of the Statute, prepare charts and memoranda, as a part of their preparation of an indictment for trial,

and these writings or memoranda would be received in evidence against the accused, at the trial, on the pretext that they were writings made in the regular course of business--*the sole alleged business of the persons making the writings or memoranda being that of helping the Prosecutor in preparing for trial of the accused.* Under such a rule of evidence, any person accused of any crime would be absolutely defenseless against the mass of data, charts, graphs, summaries and memoranda that could be assembled by the Prosecutor and received in evidence against him.

The construction and application by the learned Circuit Court of the above cited Federal Statute is so radical and prejudicial to the fate of every accused person, as well as to the liberty of this petitioner, as to require review by this Court of the judgment of affirmance. Certainly, such an important and far reaching proposition involving a question of Federal law should first be settled by the highest Court of the land before it has become a part of our criminal jurisprudence.

Not one of the cases cited by the learned Circuit Court of Appeals, including *Ulm* v. *Moore-McCormack Lines* (115 F. 2d. 492; 117 F. 2d. 222), or *Northern Pac. Ry. Co.* v. *Keyes* (91 F. 47, 58), or *United States* v. *Cotter* (60 F. 2d. 689, 693), supports the propostion laid down by the learned Circuit Court in the instant case with regard to the applicability of the above Statute.

The learned Circuit Court also applied the same interpretation of the Statute to the *several aides* of Karcher, most of whom were not called; and expressly held that Karcher's aides *were acting in the regular course of a business* and that the writings or records which they made, as a part of their alleged examination of the tax records, were writings or records made *in the regular course of business* within the meaning of the Statute. In other words, the learned Circuit Court held that said aides, the Govern-

ment's special F. B. I. agents, were also engaged in a *"business, profession or occupation"* within the meaning of the Statute, and that the notes and memoranda which they made while investigating the tax records were within the meaning of the *"writing or record"* referred to by the Statute. This reasoning is as fallacious as the parallel reasoning which the Court applied to Karcher's charts, summaries and graphs. But the reasoning when applied to Karcher's aides fails on another score—*none* of the writings, records, memoranda, or cards containing their notes of their alleged examinations of the tax records of the City of New York was received into evidence; in fact, they were not even offered by the prosecution. Therefore, as far as the writings and records of Karcher's aides are concerned, the question of the applicability of the Statute does *not arise* in the instant case,—although the learned Circuit Court actually assumed that it did, and rendered its decision of affirmance in part *on that basic erroneous assumption.*

For the reasons above stated, the decision of the learned Circuit Court should be reviewed by the Supreme Court of the United States.

C.

***Northern Pac. Ry. Co.* v. *Keyes* (91 Fed. 47; 8 Circuit), Distinguished.**

Northern Pac. Ry. Co. v. *Keyes, supra,* referred to by our learned Circuit Court, does not sustain the Court's construction and application of Title 28 U. S. C. A. Sec. 695. In that case: (1) the information contained in the tables and computations was gathered from the books and records of the Northern Pac. Ry. Co. and other railway companies who were the plaintiffs in said actions, (2) said books and records were kept in the regular course of the

business of the plaintiffs, (3) the tables were compiled by about 50 clerks who were regular employees of the plaintiff railway companies, (4) all the records on which the tabulations and computations (received in evidence) were based were placed by the plaintiffs at the disposal of the defendant, (5) all the way bills and other records of the plaintiff railway companies from which said tabulations and computations were made were actually in the building where the testimony was taken, (6) all of the 40 or 50 clerks who made the tabulations and computations from their examination of the plaintiffs' books and records were also present in the building at the time the testimony was taken, (7) counsel for the plaintiffs made available to counsel for defendant all of the 40 or 50 clerks, employees of the plaintiff railway companies, for cross examination, and (8) invited counsel for defendant to call any of the clerks for the purpose of such cross examination.

Every one of the foregoing facts is wanting in the instant case. The foregoing facts present in *Northern Pac. Ry. Co.* v. *Keyes, supra,* indicate its complete dissimilarity from the instant case, and discloses that the *Northern Pac. Ry. Co.* case simply represents an early application of the rule (which was followed by some of the Circuit Courts of Appeals prior to the enactment of Title 28 U. S. C. A. Sec. 695), that it is sufficient to show that entries which are contained in books of a large business establishment were kept in the regular course of business without producing the particular persons who actually made the entries and having them identify the entries.

POINT IV.

The learned Circuit Court of Appeals for the Second Circuit, in construing Title 28 U. S. C. A. Sections 695 and 695-h, has rendered a decision herein in direct conflict with the decisions of the Ninth Circuit Court of Appeals.

Section 695-h of Title 28 U. S. C. A. provides:

> "Sec. 695-h: *Prospective nature of chapter.* Section 695 * * * shall be prospective only, and *not retroactive.*" (Italics ours.)

The indictment in the instant case was found *June 7th, 1935. The above Statute was approved June 20th, 1936.* By its terms, therefore, it is *not applicable* to the instant case. Assuming, but not admitting, that the interpretation of Sec. 695 of the Statute by our learned Circuit Court is the correct one, it has no application to the instant case because the indictment against petitioner was found *more than a year prior to the passage and approval of the Statute.* So held in *Greenbaum* v. *United States,* 98 F. 2d. 574 (C. C. A. 9), and *Shreve* v. *United States,* 103 F. 2d. 796 (C. C. A. 9).

The learned Circuit Court of Appeals for the Second Circuit, in construing and applying Title 28 U. S. C. A. Sections 695 and 695-h, has rendered a decision in direct conflict with the above decisions of the *Ninth* Circuit Court of Appeals.

POINT V.

As stated in the opinion of the learned Circuit Court of Appeals Second Circuit herein there is direct conflict between our Circuit Court and the Sixth Circuit Court of Appeals.

Our learned Circuit Court of Appeals in sustaining the ruling of the Trial Court admitting Karcher's incompetent hearsay testimony, charts, summaries and graphs relating to the alleged tax arrears said:

> "The only possible reason for asserting that these authorities are not quite controlling is that these cannot be business entries, since they were made in preparing evidence for this trial; and, indeed, the case of *Morton Timber Company* v. *United States,* 6 Cir., 91 F. 2d. 884, 889, does say, as a ground for affirming a ruling made below, that entries 'made apparently for exclusive use as evidence in this case were therefore not in the regular course of business'" (p. 3501).

In *Morton Timber Company* v. *United States, supra,* stated by our learned Circuit Court of Appeals as *a conflict case,* the tally sheets and calculations in question were, in fact, made by Holt and Latham and were based upon the estimates of six to ten timber estimators, who went out on timber cruises to estimate the quantity of timber in dispute. Latham testified that he supervised the work of the estimators, that he himself made no estimates of the quantity of timber in a tree, and made no tallies. He merely supervised the work of the cruise. The tally sheets of the cruise were sent to Knoxville where Latham looked them over. The plaintiffs, in *Morton Timber Company* v. *United States,* offered in evidence the calculations made from the tally

sheets, and also a copy of the summary of purportedly all of the tally sheets. The Trial Court excluded the evidence as hearsay. The Circuit Court of Appeals, Sixth Circuit, affirming this ruling said:

> "We think the evidence rejected by the trial court falls within no exception to the hearsay rule.
>
> "The tally sheets and the calculations therefrom were not entries made in the regular course of business. On the contrary, they were made apparently for *exclusive use as evidence in this case.*
>
> * * * * *
>
> "The action of the District Court, in refusing to admit the evidence tendered to show the results of the Holt and Latham cruise is approved."

In the instant case the tax office books and records alleged to have been examined by the four F. B. I. agents,—Browner, Tollette, Daly and Ward,—in connection with the alleged tax arrears,—were not books and records kept by any of the parties to this action, but were the books and records of a *third party,* namely—the City Collector of the City of New York; and neither Karcher nor any of the four F. B. I. investigators kept said books and records, made any of the entries therein, nor had any connection whatever with them; nor were any of the tax clerks, who made entries therein, produced.

The error in admitting Karcher's incompetent hearsay testimony, charts, summaries and graphs relating to the alleged tax arrears, is not sustained by the facts or reasoning in *United States* v. *Cotter* (60 F. 2d. 689, 693, 2d. Circuit), cited by the learned Circuit Court of Appeals in its Opinion herein. In the *Cotter* case bank deposit slips of the defendants themselves and ledger sheets from the banks in which the defendants kept their accounts were received in evidence

for the purpose of enabling the Prosecutor to trace to the defendants, in that case, some of the proceeds of the shares of stock sold. *In the instant case neither the tax records nor any transcripts of the tax records were offered or received in evidence.* Instead, the incompetent hearsay evidence consisted of Karcher's testimony, charts, summaries and graphs based on something entered on some cards by the several F. B. I. investigators, only one of whom was called and who testified that he called off something from the records of the various City Collector's offices of four (4) of the boroughs of New York City, and that Tollette put something down on the cards (2439-40).

The reasoning of Cardozo, *J.* in his dissenting opinion in *Great Northern Railway Co.* v. *Washington* (300 U. S. 154, 168-174), referred to by our learned Circuit Court in its Opinion, was directed to the particular facts present in that case, and does not justify the prejudicial error committed by the receipt in evidence of the incompetent hearsay Karcher testimony, charts, summaries and graphs on the question of alleged tax arrears.

In *Queen* v. *Hepburn* (11 U. S. 290) Marshall, *Ch. J.* said, page 295:

> "It was very justly observed by a great judge that all questions upon the rules of evidence *are of vast importance* to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.
>
> One of these rules is, that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its ex-

clusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." (Italics ours.)

Point VI.

The learned Circuit Court of Appeals in construing and applying Title 28 U. S. C. A. Sections 695 and 695-h, has decided an important question of Federal law which has not been but should be settled by this Court; and has decided it in such a way that the public interest will be promoted by prompt settlement in this Court of the questions involved.

From the foregoing it appears that the important recent Federal Statute *28 U. S. C. A. Secs. 695 and 695-h,* which involve the question of the admissibility of evidence, in both civil and criminal cases, has not been before this Court for construction; that there is clear conflict between the decision of our learned Circuit Court of Appeals herein and the decisions of the *Eighth Circuit Court of Appeals* on the question of whether the Statute is retroactive as to indictments found *prior to* the enactment of the Statute; that, apart from the Statute, there is direct conflict, as stated by our learned Circuit Court of Appeals in its Opinion of affirmance herein, between the Second Circuit Court of Appeals and the *Sixth Circuit Court of Appeals* (*Morton Butler Timber Co.* v. *United States,* 91 F. 2d. 884), and that this conflict is not resolved by the able dissent of Mr. Justice Cardozo in *Great Northern Railway Co.* v. *Washington* (300 U. S. 154), in which case this Court, in its majority Opinion, sustained the Supreme Court of Washington in affirming the Trial Court's rejection of incompetent hearsay testimony offered in that case.

The question presented is not only one of conflict between the decisions of different Circuit Courts of Appeals, but one which is thoroughly unsettled on an important question of Federal law which constantly arises in the trial of both civil and criminal cases. The entire situation is one which requires review by this Court to settle the grave questions involved, both under the recent Statute and apart from the Statute.

POINT VII.

An erroneous ruling which relates to the substantial rights of a party is ground for reversal, unless it affirmatively appears from the whole record that it was not prejudicial.

McCandless v. *United States*, 298 U. S. 342;
Williams v. *Gt. Southern Lumber Co.*, 277 U. S. 19, 26;
United States v. *River Rouge Co.*, 269 U. S. 411, 421.
Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 82.

A.

In the instant case it *does not affirmatively* appear from the whole record that the rulings of the Trial Court compelling petitioner on cross examination, over objections and exceptions, to testify that he did not accept an invitation to appear before the Federal Grand Jury investigating this case were not prejudicial to petitioner and did not deprive him of a fair trial.

B.

It does not affirmatively appear from the whole record that the erroneous admission in evidence of Karcher's

incompetent hearsay testimony, charts, summaries and graphs relating to alleged tax arrears was not prejudicial to petitioner and did not deprive him of a fair trial.

The application of the above well-settled principle to the erroneous admission of *hearsay evidence* was made by this Court in *Williams* v. *Gt. Southern Lumber Co., supra,* upon *certiorari* (275 U. S. 511) to the Circuit Court of Appeals, Fifth Circuit. In that case the *hearsay evidence* erroneously introduced was testimony by the wife of the deceased to the effect that she heard one Carson say that "they had come to kill Lem Williams, and they killed him." This Court, in an Opinion delivered by Mr. Justice Sanford, said in that case:

> "There was a direct conflict in the evidence as to whether Carson had been with the party at the time Williams was killed; the weight of the evidence being to the effect that he had been sent to another part of the city and had arrived after the killing. But, however this may be, the statement made by him as to the purpose the party had in coming, made after the killing had taken place and when the conspiracy, if one had existed, had accomplished its purpose, *was hearsay,* not part of the *res gestae,* and not admissible against the Company.
>
> 3. * * * *The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company.* * * * an error which relates, not merely to formal or technical matters, but to the substantial rights of the parties 'is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.' *United States* v. *River Rouge Co.,* 269 U. S. 411, 421. Here it cannot be said from the entire record that the errors were harmless; but on the contrary

they were material and of a highly prejudicial character." (Italics ours.)

This Court again applied the above-stated principle to the admission of *incompetent hearsay* testimony, in the case of *Shepard* v. *United States* (290 U. S. 96), certiorari to the Circuit Court of Appeals Tenth Circuit granted in 289 U. S. 721. In that case the incompetent hearsay testimony was the dying declaration of the deceased to the effect that she was "dying of poison given by her husband." This Court, in an opinion by the late Mr. Justice Cardozo, reversing a judgment of conviction which had been affirmed by the Circuit Court of Appeals for the Tenth Circuit, said at page 104:

"This fact, if fact it was, the Government was free to prove, but *not by hearsay* declarations. It *will not do to say that the jury might* accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. *Discrimination so subtle is a feat beyond the compass of ordinary minds.* The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. *When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.* Thayer, Preliminary Treatise on the Law of Evidence, 266, 516; Wigmore, Evidence, Sections 1421, 1422, 1714." (Italics ours.)

C.

It *does not affirmatively* appear from the whole record that the Trial Court's denial of petitioner's motion to

dismiss, made at the close of the Government's case, because the Conspiracy Count does not charge a crime as a matter of law, was not prejudicial to petitioner and did not deprive him of a fair trial.

A mere reading of the Conspiracy Count (Fourteenth Count) shows conclusively that it sets up an undisclosed and vague scheme without referring to, or incorporating by reference, the scheme alleged in the thirteen (13) substantive counts of the indictment. In substance, the Conspiracy Count merely alleges that defendants conspired and used the mails. It does not reveal what the scheme was. The insufficiency of the Conspiracy Count is not supplied or cured by the Government's Bills of Particulars. Petitioner's motion for a Bill of Particulars on the Conspiracy Count *was denied* (121 i. and 123). It does not indicate the nature of the charge against the defendants, and it is so vague, indefinite and uncertain that it should have been dismissed when appropriate motions were made at the close of the Government's case (3052-90). The motions were denied, and exceptions taken.

In support of petitioner's contention that this Count is fatally defective we deem it sufficient to point to the following decisions of this Court which squarely hold that a Conspiracy Count of this vague and indefinite nature, without specifying the facts constituting the offense, cannot stand (*United States* v. *Hess,* 124 U. S. 483; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Cruikshank,* 92 U. S. 542; *Pettibone* v. *United States,* 148 U. S. 197).

Obviously, the purpose of inserting the Conspiracy Count in the indictment was to afford the Prosecutor the great latitude in the presentation of evidence that is permissible under a Conspiracy Count; and it is undoubtedly the fact that the Trial Jury, which convicted petitioner on the *defective Conspiracy Count,* would have acquitted him on

the thirteen substantive mail fraud counts if the insufficient Conspiracy Count had been dismissed,—as it should have been.

POINT VIII.

CONCLUSION.

For the reasons stated in this petition and in this brief it is respectfully submitted that the application for writ of certiorari should be granted.

Respectfully submitted,

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